IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 10-0001

STATE OF MONTANA,
Plaintiff and Appellee,

v.

SHAWN EARL McCLURE,
Defendant and Appellant.

ON APPEAL FROM THE MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY.
THE HONORABLE JOHN C. BROWN, presiding.

APPELLANT'S REPLY BRIEF

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REPLY

The State initially argues the Court should waive the issue of McClures's absence from trial because it is raised for the first time on appeal. (State's Br., pgs. 7-8). McClure has argued his exclusion from trial absent a proper waiver is structural error. (Appellant's Br., pg. 12). McClure's argument is supported by precedent from this Court which has specifically held that a defendant's absence from a critical stage is structural error absent a proper waiver. This Court has defined "structural error" as:

> error that is 'typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding. Because of its very nature, it cannot be qualitatively or quantitatively weighed against the admissible evidence introduced at trial. Structural error is presumptively prejudicial and is not subject to harmless error review jurisprudentially or under our harmless error statute found at § 46-20-701, MCA
>
> Structural error is automatically reversible and requires no additional analysis or review.

State v. Dewitz, 2009 MT 202, ¶ 44, 351 Mont. 182, 212 Mont. 1040 (quoting, *State v. Van Kirk*, 2001 MT 184, ¶¶ 38-39, 306 Mont. 215, 32 P.3d 735).

While it appears that this Court has never specifically equated "plain error" with "structural error," there should be no question that structural error is plain error, and, therefore, appropriate for review for the first time on appeal. This

Court has repeatedly ruled it "will review a claim notwithstanding its being raised for the first time on appeal under the plain error doctrine if failure to do so may result in a manifest miscarriage of justice...." *State v. Bateman*, 2004 MT 281, ¶ 20, 323 Mont. 280, 99 P.3d 656. Given the definition of "structural error" above, an error which requires automatic reversal and undermines the fairness of the entire trial proceeding, it certainly also would result in a manifest miscarriage of justice if this Court failed to allow McClure's claim to be brought for the first time on appeal. Given this situation, McClure's claim is appropriate for the first time on appeal and the Court should consider it.

This Court's definition of structural error also undermines the State's argument that this Court should affirm McClure's conviction because, "even if there was some technical error by not obtaining an express personal waiver on the record...because McClure can make no showing of any conceivable prejudice." (State's Br., pg. 11). Again, as set forth above, with structural error, no showing of prejudice in necessary because "structural error is presumptively prejudicial." *Dewitz*, ¶ 44.

The crux of the State's case is based on the premise that McClure's voluntary absence constituted a waiver of his right to be present. The State's attempt to cast McClure's "voluntary absence" from the trial as de facto – and

thereby legally sufficient – is a waiver of his right to be present during trial. Such an argument is simply inconsistent with this Court's prior precedent and requires the Court to engage in an assumption that McClure's voluntary absence was, in fact, a knowing, voluntary, and intelligent waiver. In *State v. McCarthy*, this Court held it would not "engage in presumptions of waiver; any waiver of one's constitutional rights must be made specifically, voluntarily, and knowingly." *State v. McCarthy*, 2004 MT 377, ¶ 32, 324 Mont. 1, 101 P.3d 288. The record in this case is completely silent on whether McClure's voluntary absence was, minimum, a knowing waiver. There is no mention the district court advised McClure of the perils of absenting himself from trial; there is no indication the District Court advised McClure that the jury would be advised it could not consider his absence from trial as evidence of guilt.

The situation is analogous to the requirements for a knowing and intelligent waiver of the right to counsel. This Court has ruled a district court, when faced with a defendant who wishes to proceed without counsel – is required to specifically discuss the dangers and disadvantages of pro se representation so the defendant knows what he or she is doing by waiving the right to counsel. *See State v. Colt*, 255 Mont. 407-407, 843 P.2d 747 (1992). It is only after such a discussion that a criminal defendant is able to waive an important constitutional

right. The same holds true for the equally important right to be present during trial. McClure's act of simply walking out of the trial does not satisfy the necessary requirements for a knowing waiver.

Finally, the State does not even attempt to argue that McClure's "waiver" of his right to be present during trial constitutes a "waiver" of his right to be present during the return of verdict. In McClure's case, the District Court did not even attempt to obtain a waiver from McClure. Rather, it relied on an assumption from McClure's counsel, who merely presumed McClure did not want to be present. If this Court is prohibited from engaging in presumptions of a waiver, the District Court should also be. Creating a waiver of his right to be present during the return of verdict simply from an assumption by McClure's counsel – who had not even spoke with McClure prior to the return of verdict – is speculation, pure-and-simple.

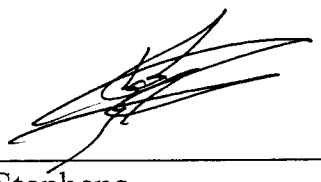
CONCLUSION

There is no question both the State and the District Court were frustrated with McClure. He was recalcitrant and obstreperous during his trial proceedings. Fortunately, he is still afforded the same basic constitutional rights as the most mild and cooperative criminal defendant. He has a right to be present during critical stages of criminal proceedings, including trial and return of verdict. If he wished to waive that right, he also had a right to be properly informed of what,

exactly, he was waiving. As with a waiver of counsel, the District Court in this case was obligated to obtain a knowing and intelligent waiver from McClure. A knowing and intelligent waiver cannot be presumed; it cannot be interpreted by the simple act of walking out of a courtroom. A knowingly and intelligent waiver must be demonstrated from a clear record which shows that the defendant understands what he is waiving, including the perils and pitfalls of doing so.

For these reasons, the District Court committed structural error in failing to obtain a knowing, voluntary, and intelligent waiver from McClure of his right to be present at all critical stages of the proceedings. Especially absent from McClure's case is any indication that McClure clearly understood what he was giving up, i.e. the "knowingly" requirement of a proper waiver. This Court should reverse McClure's conviction and remand the case to the District Court.

Respectfully submitted this 1st day of June, 2010.



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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Reply Brief is printed with proportionately-spaced Time New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does note exceed 5,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my WordPerfect X3 software.

Dated this 1st day of June, 2010.

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I, Colin M. Stephens, do hereby certify that I delivered a true and correct copy of this Appellant's Reply Brief to the following via the means indicated:

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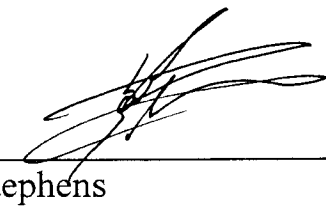

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